Supreme Court, U.S.
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No. _____

In The
**Supreme Court of the United States**

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MARVA SALEM,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

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**On Petition For A Writ of Certiorari**
**To The Supreme Court of Georgia**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the decision of the Georgia Supreme Court, the State Court of last resort, in upholding a forfeiture of two parcels of land, a commercial business and building, a Forty Thousand Dollars ($40,000.00) checking account and a Certificate of Deposit of Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100's ($72,242.77) is in conflict with the Eighth Amendment and this Court's decision in U. S. v. Bajakajian, 118 S.Ct. 2028 (1998), when the offense giving rise to the forfeiture involved less than one ounce of marijuana and a residue amount of cocaine.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Marva Salem respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered in the above-entitled proceeding on April 9, 1999 and denial of Motion to Remand on May 28, 1999.

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## OPINIONS BELOW

The decision of the Supreme Court of Georgia to vacate the previously issued Writ of Certiorari (App. 1) styled as Case No. S98G1586 and subsequent denial of Motion for Reconsideration on May 3, 1999 (App. 2) and Motion to Remand on May 28, 1999 which involved the appeal of the decision of the Georgia Court of Appeals (App. 3).

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## JURISDICTION

The Supreme Court of Georgia vacated the Writ of Certiorari on April 9, 1999. On May 28, 1999 the Supreme Court of Georgia denied a Motion for Remand. The jurisdiction of this Court is invoked under U. S. Supreme Court Rule 10(c) because the petitioner has exhausted her remedy at the State Court of last resort.

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## STATEMENT OF CASE

This appeal from the State Court of last resort, the Georgia Supreme Court, presents the question of whether a grossly disproportionate forfeiture has taken place in relation to the crimes charged which is excessive under the Eighth Amendment.

This is a forfeiture proceeding brought by the State of Georgia against two (2) parcels of real property, the building, structure and business known as the "Twentieth Century Club", located at 160 Chandler Avenue in Reidsville, Tattnall County, Georgia; a checking account in the amount of Forty Thousand Dollars and No Cents ($40,000.00), one (1) Certificate of Deposit in the amount of Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100's ($72,242.77), a Certificate of Deposit in the amount of Six Thousand Five Hundred Dollars and No Cents ($6,500.00), Two Thousand Three Hundred and Fifty Six Dollars and No Cents ($2,356.00) in U. S. Currency; and numerous firearms. The State was awarded all of the real property, the business, money and personal property for the exception of the Certificate of Deposit in the amount of Six Thousand Five Hundred Dollars and No Cents ($6,500.00), ordered on June 25, 1996 by the Superior Court of Tattnall County.

In the case at bar, there was only a minimal amount of contraband found and proven to exist and an enormous amount of unproven speculation put forth in evidence. The actual contraband found on Mr. Lawson's premises that is part of the subject of this forfeiture was nine (9) small baggies of marijuana, which amounted to less than one-half ounce, and a baggie containing cocaine residue of no discernable weight. Mr. Lawson was arrested on charges of possession of cocaine with intent to distribute and possession of marijuana with intent

to distribute. During the officers' search of the premises, they also found a copy of the Last Will and Testament of Marva Salem, a checking account deposit receipt for Forty Thousand Dollars and No Cents ($40,000.00) and a Certificate of Deposit in the name of Marva Salem for Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100's ($72,242.77).

Although not a part of the record in the case, because the event occurred after the forfeiture proceedings, Mr. Lawson entered a guilty plea to some of the offenses alleged in the forfeiture proceeding. Mr. Lawson was charged with possession of marijuana with intent to distribute and possession with intent within 1,000 feet of a public school, and possession of cocaine with intent to distribute and possession of cocaine with 1,000 feet of a public school. On January 9, 1997, Mr. Lawson pled guilty to Counts 2 and 4 of the indictment, possession of marijuana with intent to distribute and possession of marijuana with intent to distribute within 1,000 feet of a public school. The location of the nightclub and residence of Mr. Lawson was within 1,000 feet of a public school. However, it is worth noting the nightclub was present many years before the construction of the school. The State dismissed the cocaine charges. Mr. Lawson was given a fine of $2,000.00 plus additions, 120 days in detention center and four years probation. (See attached App. 15). The appellant, Ms. Salem, was not charged with any crime.

During the trial, the State presented unfounded testimony concerning Mr. Lawson's involvement in drug activity. The Court of Appeals painstakenly reanalyzed these facts in ruling for the State. However, the sum and substance of all this speculation, as properly found by the Court of Appeals of Georgia, is clearly found in their ruling. As Judge Ruffin succinctly stated, "**the extent of Lawson's involvement in all of the transactions is not altogether clear**" (Page 5).

The Court also noted that the true owner of the property, the petitioner, Marva Salem, had not been arrested or shown to have knowledge of any illegal activity. Additionally, the Court came to the same conclusion about the Certificate of Deposit and the checking account, "**We find no evidence, only mere speculation, that the money and Certificate of Deposit were used or intended for use to facilitate a drug transaction or that the money was derived from drug transactions**" (Page 10).

The State Court of Appeals affirmed the decision of the trial court on June 5, 1998. The petitioner then sought a Writ of Certiorari from the Georgia Supreme Court which was denied on October 23, 1998 with one (1) dissent. Thereafter, the petitioner filed a Motion for Reconsideration with the Georgia Supreme court which was granted. (App. 4) The Court was interested in deciding the issue of whether the forfeiture was excessive under the Eighth Amendment on the recently decided case by this Court in U.S. v. Bajakajian, 118 S.Ct. 2028 (1998). The Georgia Supreme Court granted the Writ and oral arguments were held. The State of Georgia filed a Motion to Vacate the Writ of Certiorari citing that the Petitioner failed to raise the excessiveness claim to the Georgia Court of Appeals. Notwithstanding, the Petitioner's assertion that the Bajakajian, supra, decision of this Court created a new constitutional standard for forfeitures, the Georgia Supreme Court vacated the Writ of Certiorari finding it had been improvidently granted on April 9, 1999 (App. 1).

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## REASONS FOR GRANTING THE PETITION

The decision of the Georgia Supreme Court to vacate the Writ of Certiorari in this case is in direct violation with the Eighth Amendment and recent relevant decisions by this Court. *In Rem* forfeitures involve fines by the government and must be scrutinized carefully. As this Court decided in U. S. v. Bajakajian, 118 S.Ct. 2028 (1998), a forfeiture must not be disproportionate to the crimes involved. Clearly, this forfeiture fails to meet that standard and the Georgia Supreme Court's decision not to decide this case is a direct conflict with this important constitutional standard.

### I. This Petition for Writ of Certiorari should be granted because the Supreme Court of Georgia improperly vacated their Writ of Certiorari and failed to decide such an important question of constitutional law involving the Eighth Amendment and in conflict with this Court's decision in U. S. v. Bajakajian.

The facts of this case when applied to relevant case law and the Eighth Amendment demand that this Court find the forfeiture to be **grossly** disproportionate to the crime involved and issue a remand sending the case back to the Georgia Supreme Court for finding on this issue or reverse the decision in its entirety

The Eighth Amendment provides: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted", U. S. Const. Amdt 8. The United States Supreme Court has interpreted the word "fine" as being "a payment to a sovereign as punishment for some offense." Browning-Ferris Industries of Vt., Inc. V. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106

L.Ed. 2d, 219(1989). The United States Supreme Court has also held *in rem* forfeitures, as in the case at bar, to be considered a "fine" for Eighth Amendment purposes. In Austin v. United States, 509 U.S. 602, 609, 610, 113 S.Ct. 2801, 2805, 125 L.Ed. 20. 488(1993), the Court held that although labeled, *in rem,* civil forfeiture of real property used "to facilitate" the commission of drug crimes was punitive in part and thus subject to review under the Excessive Fines Clause.

On June 22, 1998, this Court decided the case of U. S. v Bajakajian, 118 S.Ct. 2028(1998). In Bajakajian, the Court dealt with a series of facts wherein a defendant pled guilty to failure to report exported currency and the government forfeited all the money that was on his person following a customs inspection wherein the defendant was found preparing to board an international flight carrying Three Hundred Fifty Seven Thousand One Hundred and Forty Four Dollars ($357,144.00). The defendant was charged with attempting to leave the United States without reporting as required by 31 U.S.C. §5316(a)1(A) and that he was transporting more than Ten Thousand Dollars ($10,000.00) in currency. The government also sought forfeiture of the Three Hundred Fifty Seven Thousand One Hundred Forty Four Dollars ($357,144.00) under 18 U.S.C. §982(a)1 which provides that if a person convicted willfully violating §5316 shall forfeit "any property involved in such an offense". The district court which heard the case on the forfeiture found that the entire Three Hundred Fifty Seven Thousand One Hundred and Forty Four Dollars ($357,144.00) was subject to the forfeiture because it was "involved in" the offense.

The defendant appealed to the Court of Appeals for the Nineth Circuit and the Court held that the full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fine Clause of the Eighth

Amendment. The Court ordered the forfeiture of Fifteen Thousand Dollars ($15,000.00) in addition to three years probation and a maximum fine of Five Thousand Dollars ($5,000.00) under the sentencing guidelines.

The Court held that in order for a forfeiture to occur the forfeiture must fulfill two conditions to satisfy the Eighth Amendment Excessive Fine Clause: the property forfeited must be the "instrumentality" of the crime committed, and the property's value must be proportional to its owner's culpability.

This Court, in an opinion by Justice Thomas, upheld the Court of Appeals and found that the full forfeiture of respondents Three Hundred Fifty Seven Thousand, One Hundred and Forty Four Dollars ($357,144.00) would clearly violate the Excessive Fine Clause of the Eighth Amendment. The Court held that the forfeiture of the respondent's entire Three Hundred Fifty Seven Thousand, One Hundred and Forty Four Dollars ($357,144.00) would be grossly disproportional to the gravity of his offense.

Justice Thomas wrote: "the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." He went on to state, that until the case at hand, the Supreme Court had not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. The Court states, "We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." The Court stated, a strict test of proportionality cannot be applied in every circumstance. Therefore, each case must be analyzed individually. In Bajakajian, the Court held the $357,144.00 forfeiture to be grossly disproportional to the offense of failure

to report currency. The Court found the forfeiture to be much larger than the $5,000.00 fine imposed by the Court on the offense, and found the government could not show an articulable correlation to the large fine and any injury suffered by the government.

When the above standard is applied to these facts, the only conclusion is that forfeiture is patently excessive under the Eighth Amendment. Here, the police seized less than one-half ounce of marijuana and a residue amount of cocaine. However, the State forfeited two acres of commercial real estate, a building which was a thriving nightclub business, a Forty Thousand Dollar ($40,000.00) checking account, and a Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100 ($72,242.77) Certificate of Deposit. Clearly, this was a financial windfall for the State of Georgia. The business, property, land, life-savings and Certificate of Deposit established by Mr. Lawson's daughter's death were all stripped over less than one-half ounce of marijuana and a plethora of unproven speculation.

Aside from the unproven conjecture of the State, Mr. Lawson was arrested for a misdemeanor amount of marijuana. The only factors that even made the offense a felony were the nine (9) individually packaged baggies, and the location of the Twentieth Century Club to a public school. Otherwise, Mr. Lawson would have been charged and convicted of misdemeanor possession of marijuana and fined a maximum of $1,000.00 under the code section.

Mr. Lawson received an appropriate fine for his plea of guilty on the charges of possession with intent to distribute marijuana and possession within 1,000 feet of a public school. The judge imposed detention center incarceration, probation and a Two Thousand Dollars ($2,000.00) fine. (App. 15) This

fine is appropriate to the charges in this case. The forfeiture, however, is unconstitutionally excessive as in Bajakajian.

Marva Salem's constitutional rights under the Eighth Amendment have been clearly violated in this case. Because Mr. Lawson had on his premises nine (9) baggies of marijuana amounting to less than one ounce, she was stripped of all the personal and real property that had been **legally** transferred to her by Mr. Lawson. The State took two parcels of land equaling more than two acres. They took a structure which was a thriving business known as the Twentieth Century Club, with all fixtures and equipment such as pool tables, juke boxes, vending machines, etc., a Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100's ($72,242.77) Certificate of Deposit with absolutely no connection to any illegal activity, and they took a Forty Thousand Dollar ($40,000.00) Checking Account with absolutely no nexus to any illegal activity. In short, the State took away the life-savings, the life earnings, and a twenty year old business for a misdemeanor amount of marijuana. This case is a quintessential example of a "fine" being disproportional to the gravity of the offense and it should have been heard by the Georgia Supreme Court and reversed. The Georgia Supreme Court's decision to vacate their Writ of Certiorari is a direct conflict with Federal law.

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## CONCLUSION

For the foregoing reasons, when the facts of this case are analyzed with relevant constitutional law, a reversal is demanded because of the gross excessiveness of the forfeiture.

The decision of the trial court and affirmance of the Georgia Court of Appeals and the Georgia Supreme Court's failure to hear the matter as to the two tracts of land and structure known as the Twentieth Century Club, 160 Chandler Avenue, in Reidsville, Georgia, the Seventy Two Thousand Two Hundred Forty Two Dollars and 77/100 ($72,242.77) Certificate of Deposit and Forty Thousand Dollars and No Cents ($40,000.00) Checking Account which belongs to the Petitioner, Marva Salem, should be reversed and the property returned to Ms. Salem, with interest. This Court should either remand the case to the Georgia Supreme Court for an appropriate finding as to excessiveness or reverse the decision out right.

Respectfully submitted

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# APPENDIX

SUPREME COURT OF GEORGIA
Case No. S98G1586

Atlanta, April 9, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVA SALEM V. STATE OF GEORGIA

After considering this matter, the Court finds the writ of certiorari was improvidently granted and the writ is vacated.

Court of Appeals No. A98A0101

**SUPREME COURT OF THE STATE OF GEORGIA**
Clerk's Office, Atlanta
I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.
(S) Chief Deputy Clerk

SUPREME COURT OF GEORGIA
Case No. S98G1586

Atlanta, May 03, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVA SALEM V. STATE OF GEORGIA

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA**
Clerk's Office, Atlanta
I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.
(S) Clerk

SUPREME COURT OF GEORGIA
Case No. S98G1586

Atlanta, May 28, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARVA SALEM V. STATE OF GEORGIA

Upon consideration of the Motion to Remand filed in this case, it is ordered that it be denied.

**SUPREME COURT OF THE STATE OF GEORGIA**
Clerk's Office, Atlanta
I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.
(S) Chief Deputy Clerk

SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta, December 7, 1998

**TO ALL COUNSEL:**

Case No. **S98C1586. MARVA SALEM V. STATE OF GEORGIA**

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur.

**********

This case will be assigned to the MARCH 1999, oral argument calendar **automatically under Supreme Court Rule 50 (2), as amended September 13, 1996.**

This Court is particularly concerned with the following issue or issues:

***Whether the forfeiture in this case is proportionate to the crimes involved so as to be permissible under theExcessive Fines Clause of the Eighth Amendment. (See U. S. v. Bajakajian ___ U.S. ___ (118 SC 2028, 141 LE2d 314)(1998).***

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,
**Sherie M. Welch, Clerk**

**By:** _____(S)
Lynn M. Stinchcomb,
Chief Deputy Clerk

**THIRD DIVISION**
**POPE, P.J.,**
**BEASLEY AND RUFFIN, JJ.**
NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

**June 5, 1998**

In the Court of Appeals of Georgia

A98A0101. SALEM V. STATE OF GEORGIA RU-005

RUFFIN, Judge.

The state filed a forfeiture action against two parcels of real property, a checking account and a certificate of deposit ("CD") owned by Marva Salem. The State alleged that the real property was used to facilitate the possession of cocaine and marijuana and the distribution of marijuana and that the money in the checking account and the CD were proceeds derived or realized from the sale of cocaine and marijuana. Salem answered, asserting that she was an innocent owner of the forfeited property and was not holding the property for the benefit of any person whose conduct gave rise to the forfeiture action. The trial court forfeited all of the property at issue. Salem appeals, and for reasons which follow, we affirm.

As forfeitured actions are civil proceedings, the State was required to prove its case by a preponderance of the evidence. Bettis v. State of Georgia, 228 Ga. App. 120, 121 (491 SE2d 155) (1977). "Subsections (o) (5) and (p)(6) of OCGA §16-13-49 provide that forfeiture proceedings shall be held by the court without a jury. Upon appellate review, factual

findings made after a bench trial shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. The clearly erroneous test is the same as the any evidence rule." (Citations and punctuation omitted.) Lyon v. State of Georgia, 230 Ga. App. 264 ( SE2d ) (1998).

Given the above standards, the evidence shows that Salem and Willie Lawson have been friends since approximately 1965. Salem testified that as times Lawson would help her out of financial binds by co-signing loans with her or assisting her in making loan payments. She testified that in return she would take Lawson to the doctor due to his poor health.

On January 2, 1996, Lawson indicated to the branch manager of the First Citizens Bank in Reidsville, Georgia, that he wanted to set up a CD in Salem's name. Lawson's reasons for doing this were that Salem "had been a friend to him throughout the years, and she had stood by him even when his family did not, and he wanted to take care of her." Lawson mentioned to the branch manager that he had previously deposited some money in Lawson's daughter's name, but that she had spent it. The CD established in Salem's name was for $72,242.77. The CD originated from $20,000 that came from Lawson's business/checking account and $30,000 from a savings account he has set up in his daughter's name. The $50,000 was placed into a CD in 1990 and, with interest, grew into the $72,000 placed into Salem's CD in 1996. According to the branch manager, Lawson clearly understood that he was giving Salem the money and that he would no longer have any interest or control over it.

In addition, Lawson set up a checking account in Salem's name in January 1996. Lawson deposited $40,000 into Salem's new checking account. Finally, on January 12, 1996,

Lawson quitclaimed to Salem on January 12, 1996 four tracts of real property, including one tract on which Lawson's nightclub, the Twentieth Century Club, was located on an adjacent tract used as a parking lot for the club. On January 16, 1996, Salem executed a will in which she bequeathed to Lawson the CD, the $40,000 checking account and the real property she received from him.

The police had suspected for several years that drugs were being sold from Lawson's nightclub. One evening during March, 1991, Officer F. J. Shuman of the Reidsville Police Department drove by Lawson's club and noticed Lawson standing outside the club in a wooded area. Officer Shuman saw Lawson making motions with his hand, and so he exited his car and walked over to the area where Lawson had been standing. He found on the ground a pill bottle that contained 2.5 grams that tested positive for cocaine. However, Lawson was not arrested. Then, on two occasions in 1992, a man named Lonnie Johnson assisted Officer Shuman in purchasing drugs at Lawson's club. Johnson said that on both occasions he purchased drugs from Lawson. The substance from each buy weighed less than one gram and tested positive for cocaine. However, Officer Shuman never witnessed Lawson selling cocaine and Lawson was never charged with any crime. In fact, Officer Shuman testified that he investigated Lawson for drug dealing for nine years and never arrested him.

At other times during the 1990's, other police officers investigated drug dealing from Lawson's club. Officer Michael Richardson of the Hinesville Police Department worked undercover with the Tri-Circuit Drug Task Force in 1993. On October 2, 1993, he pulled into the nightclub's parking lot and was approached by a man, Charles Smith, inquiring as to what Officer Richardson wanted. Officer Richardson said $20 in crack cocaine and Smith told him to return in 30 minutes.

Richardson saw Smith turn and walk towards the club. When Richardson returned, Smith was standing near the front of the club. He walked over and gave Richardson the cocaine. Then, on October 26, 1993, Richardson accompanied a confidential informant to the club. While Richardson waited in the car, the informant went into the club and returned with Smith. As the informant was purchasing the drugs, Lawson began yelling from the club at the informant and Smith to get Richardson out of there because Richardson was a police officer. However, Officer Richardson never saw Lawson selling drugs and admitted there was no probable cause to arrest Lawson.

A trooper from the Georgia State Patrol testified that he was involved in several more drug buys at Lawson's club in January 1994. According to the trooper, Lawson directly involved in at least one of the transactions. The suspects named in these buys were Lawson, his club, Smith and a man named Willie A. Williams, Lawson's son. In each buy, less than a gram of cocaine was sold. There is no evidence of record that Lawson was arrested for any crime at this time.

In 1995, Officer Eddie Rewis of the City of Lyons Police Department spoke with Lawson, whom Rewis had known for 20 years. According to Rewis, during the conversation, Lawson admitted that in the past he had dealt in cocaine and marijuana and had become addicted to cocaine.

Five additional drug buys were made at the club in February, 1996. Agent Tracy Sands with the Tri-Circuit Drug Task Force worked with a confidential informant in these buys. On February 9, 1996, the informant purchased less than a gram of cocaine from Williams, Lawson's son, near the club's bathroom. The next purchase was February 16, 1996. Again, the informant entered the club to purchase cocaine. The informant said he purchased drugs from Lawson's son while

Lawson watched from the rear of the club. The substance from this buy also tested positive for cocaine.

On February 17, 1996, the informant went inside the club to purchase more drugs. The informant said that as he walked toward Williams, Lawson directed another man, Raymond Bradley Johnson, to meet the informant. Johnson and the informant walked outside of the club and down the street. Eventually, Johnson sold the informant outside of the club less than a gram of cocaine.

Three other drug buys utilizing the informant occurred on the club premises on February 21, 23 and 28 of 1996. In one transaction, the informant purchased less than a gram of cocaine from Williams. In another of the late February buys, the informant purchased 1.7 grams of a substance from a man named Nick Tattnall which tested positive for cocaine. In the last buy, the informant purchased from Johnson less than one gram of cocaine.

On March 1, 1996, the police, pursuant to a search warrant, search Lawson's' nightclub. The police arrested six people who possessed crack cocaine. The police seized nine baggies of marijuana in the bathroom of a private area in the back of the nightclub that Lawson used as a residence. The net weight of the marijuana was less than one ounce. Lawson stated that the marijuana was for his own personal use. However, he admitted he would "give the marijuana to females." The police also seized a bag containing white powder identified as lactose. State witnesses testified lactose was often used as a cutting agent for heroin and cocaine. Police seized another baggie which contained cocaine residue weighing less than a gram. The police also saw razor blades at the club, which an officer with the GBI testified were often used to process crack cocaine.

Police also seized documents concerning the forfeited money. Specifically, under a mattress in the residential area of Lawson's club the police seized the $72,000 CD which was listed in Salem's name and Salem's checkbook for her $40,000 checking account. In addition to finding the CD and the checkbook, the police found Salem's will in Lawson's residence in the back of the club. Although police seized other property, such a guns and cash, Salem has not claimed an interest in these items.

The State, in seeking to have the checking account, CD and real property forfeited, alleged that Salem was not an innocent owner of the property, but was merely holding it for Lawson's benefit.

In response to this allegation, Salem testified that there was no understanding that she was holding the real property or the money for Lawson or anyone else. Rather, she stated that she alone owned the checking account, the CD and the real property. Salem denied having any knowledge of any drugs sales taking place at Lawson's club or in any drug transactions involving Lawson. Salem further testified that she kept her documents at Lawson's club because her husband had filed for divorce and she did not want him to learn of her new acquisitions.

1. We note that the State has failed to present evidence that the contraband involved in each transaction consisted of one gram or more of cocaine or four ounces or more of marijuana. See State v. Foote, 225 Ga. App. 222 (483 SSE2d 628) (1997). Thus, the forfeitures must be based on the fact that the "property was used to facilitate a transaction in or a purchase or a sale of controlled substance or marijuana." See OCGA §16-13-49(e) ("A property interest shall not be subject to forfeiture under this Code section for a violation involving

one gram of cocaine or less or four ounces of marijuana or less unless said property was used to facilitate a transaction in or a purchase of a sale of a controlled substance or marijuana.").

We conclude that the State has sufficiently proven by a preponderance of the evidence that the real property at issue was used to facilitate the sale and purchase of cocaine and marijuana. Lawson admitted that in the past he had sold cocaine and marijuana; confidential informants had told police that they purchased cocaine from Lawson; and numerous drug transactions had taken place at the club over the years prior to March 1, 1996 when the search was executed. While the extent of Lawson's involvement in all of the transactions is not altogether clear, it is the property's involvement in the transaction that is vital to a determination of forfeiture. See Carr v. State of Georgia, 212 Ga. App. 36 (1) (441 SE2d 85) (1994), overruled on other grounds, Rabern v. State of Georgia, 221 Ga. App. 874 (473 SE2d 547) (1996). "In a forfeiture action under OCGA §16-13-49, the determination to be made by the finder of fact is not whether appellants possessed or used drugs, nor whether appellants were most likely engaged in selling drugs. The issue to be decided is whether the evidence presented by the state suffices to support a forfeiture under the relevant statute. [Cit.]" Carr, supra at 37.

OCGA §16-13-49 (d) further provides that "[t]he following are declared to be contraband and no person shall have a property right in them: (2) All property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of the is article or any proceeds derived or realized therefrom." (Emphasis supplied). As the real property was utilized to facilitate drug transactions, neither Lawson nor the owner of the property, Salem, could claim a property interest in it.

Moreover, for Salem to defeat the forfeiture of her property interest in real property, she had to meet the requirement of OCGA §16-14-49(e)(4) which provides that the owner of the property must establish that she "does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to the forfeiture. . . ." Salem had the burden to prove by a preponderance of the evidence that she was on an innocent owner under the provisions of OCGA §16-13-49(e). Maynard v. State of Georgia, 217 Ga. App. 344, 345-346 (2) (457 SE2d 253) (1995).

Here, Salem did not take control of the property after Lawson quitclaimed it to her. Rather, Lawson continued to operate his club from the property. Salem presented no evidence showing that she exercised any control over the land, and thus a factual question existed as to whether she was holding the property for Lawson's benefit. The trial court concluded that she was holding the property for Lawson, and we find that this conclusion was not clearly erroneous. Lyon, supra.

2. Concerning the CD and the checking account, we find no evidence, only mere speculation, that the money in the CD and checking account were used or intended for use to facilitate a drug transaction, or that the money was derived from drug transactions. See OCGA §16-13-49(d)(2). But OCGA §16-13-49(d)(6) also provides that no person shall have a property right in "moneys, negotiable instruments, securities, or other things of value which are found in close proximity to any controlled substance or marijuana or other property which is subject to forfeiture under this section." The CD and checkbook were "things of value" which were found in close proximity to the marijuana in Lawson's private residence. Thus, in accordance with OCGA §16-13-49(d), neither Lawson nor Salem could claim any interest in them.

Moreover, for Salem's property interest in the CD and checking account to not be subject to forfeiture, she had to prove that she "does not hold the property for the benefit of or as nominee for any persons whose conduct gave rise to the forfeiture of or as nominee for any person whose conduct gave rise to the forfeiture, and, if [she] acquired the interest through any such person, [she] acquired it as a bona fide purchaser for value without knowingly taking part in on an illegal transaction . . . ." OCGA §16-13-49(e)(4) (emphasis supplied).

While Salem testified that she did not hold the property in trust for Lawson, it is clear that she was not a bona fide purchaser for value; the CD and checking account were Lawson's gifts to her. Accordingly, Salem failed to meet all the requirements of OCGA §16-13-49(e) such that her property interest would not be subject to forfeiture. See Maynard, supra (there was no bona fide purchaser for value of real property sought to be forfeited as brother gift deeded the property to his sister as a gift).

Accordingly, we find that the trial court did not clearly err in forfeiting the real property, the CD and the checking account in this case. Lyon, supra.

Judgment affirmed.

Pope, P. J., and Beasley, J., concur.

FINAL DISPOSITION

IN THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA

CRIMINAL ACTION

NO. 96-R-148
OFFENSE(S) CT. ,VGCSA-Possession of Cocaine with Intent to Distribute, (a felony); Ct. 2, VGCSA-Poss. of Marijuana with Intent to Distribute, (a felony); Ct. 3, VGCSA-Possession of Cocaine with Intent to Distribute within 1,000 feet of a Public School, (a felony); Ct. 4, VGCSA-Possession of Marijuana with Intent to Distribute within 1,000 feet of a Public School, (a felony)

State of Georgia October Term, 1996

Vs.

Willie A. Lawson

X Plea X Non Jury Other:
XNegotiatedd
X Guilty on Count(s) 2 & 4 Counts 1 & 3 were Dismissed

XFelony Sentence

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that: The said defendant is hereby sentenced to confinement for a period of Ct. 2, Four (4) years; Ct. 4, two (2) years conc. With Ct. 2. in the State Penal System or such other institution as the Commissioner of the State Department of Corrections or Court may direct, to be computed

as provided by law, HOWEVER, it is further ordered by the Court.

XX 1) That the above sentence may be served on probation.

2) That upon service of _____ of the above sentence, the remainder may be served on probation PROVIDED That the said defendant complies with the following general and other conditions herein imposed by the Court as a part of this sentence.

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X GENERAL CONDITIONS OF PROBATION

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

X 1) Do not violate the criminal laws of any governmental unit.

X 2) Avoid injurious and vicious habits - especially alcoholic intoxications and narcotics and other dangerous drugs unless prescribed lawfully.

X 3) Avoid persons or places of disreputable or harmful character.

X 4) Report to the Probation-Parole Superiror as directed and permit such Supervisor to visit him/her at home or elsewhere.

X 5) Work faithfully at suitable employment insofar as may be possible.

X 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

X 7) Support his (her) legal dependants to the best of his(her) ability.

X 8) Probationer shall from time to time upon oral or written request by any Probation Officer, produce a

breath, urine, and/or blood specimen for analysis for possible presence of a substance prohibited or controlled by any law of the State of Georgia or of the United States.

X OTHER CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of $2,000.00 plus $50 or 10%, whichever is less pursuant to O.C.G.A. 15-21-70, and pay restitution in the amount of N/A, $20.00 Probation Fee; N/A Court Costs, N/A Attorney's fees. Payments are Ct. 2, Fine ($1,000.00), assess. ($50.00), jail fund ($100.00), D.A.T.E.F. ($500.00), V.A.P. ($50.00); Ct. 4, fine ($1,000.00), assess. ($50.00), jail fund ($100.00), D.A.T.E.F. ($500.00), V.A.P. ($50.00), shall be paid to the Reidsville Probation Office within (24) months at the rate of $142.00 per month beginning (30) days after release from the Detention Center. Defendant shall serve (180) to (240) days in the S. E. Detention Center & shall obey all rules & regulations thereof. Fee payments shall being 02-01-97.

IT IS FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition or probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

The defendant is represented by the Honorable Mitchell M. Shook, Attorney at Law, Tattnall County, by (Employment)(Appointment).

So ordered this 8th day of January, 1997.

John R. Harvey, Judge Tattnall County
Superior Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he/she instructed regarding the conditions as set forth above.

This 8th day of January, 1997. Probation Officer

Copy received and instructions regarding conditions acknowledged. This 8th day of January, 1997.

Willie A. Lawson,
Probationer